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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 176

GEORGE C. REINING,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ALEX W. SWORDS,
Counsel for Petitioner.

ROBERT S. LINK, JR.,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

The petitioner, George G. Reining, respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit, entered April 20, 1948, affirming a judgment of the United States District Court in and for the Southern District of Florida, entered June 9th, 1947, said verdict and sentence of the District Court as to counts Nos. 3 and 5 being set aside but the judgment otherwise affirmed.

Opinions Below

The opinion of the Circuit Court of Appeals appears (R. 271-276). The opinion of the United States District Court for the Southern District of Florida appears (R. 262-263).

Jurisdiction

The judgment of the Circuit Court of Appeals was entered April 20, 1948 (R. 277). The petition for rehearing was denied on May 27, 1948 (R. 281). The jurisdiction of this Court is invoked, Sec. 347, of 28 U. S. C. Rule 37 of the United States Supreme Court. On June 25th Mr. Justice Black extended the time to file this petition for certiorari until July 26th (R. 283).

Statutes Involved

Section 338, Title 18 U. S. C.
Section 77 Q (a) (1), Title 15 U. S. C.
Act of March 16, 1878, 20 Stat. 30 c. 37.

Question Presented

Is it not reversible error for the District Attorney, in argument, to call attention to the failure of the defendant to take the stand, unless the Court sharply, empatically, promptly and in unmistakable and positive terms, advises the jury that the matter is improper and they should give no consideration thereto.

Statement of the Case

On February 23, 1945, an indictment was returned in the United States District Court for the Southern District of Florida, during the February term thereof, consisting of six counts charging that petitioner and one other did devise and intended to devise a scheme and artifice to defraud and for obtaining money and property by means of false and

fraudulent pretenses. The indictment sets out various overt acts, alleged to have been committed and includes a general conspiracy charge.

At the time the petitioner, Reining, was arraigned, the alleged defendant and co-conspirator did not appear in court. The United States Attorney moved to sever as to the absent defendant and to escheat his bond. Both motions were duly granted and the defendant was placed on trial before a jury and before the Honorable William J. Barker, United States District Judge. After a lengthy trial, petitioner was convicted by the jury on all six counts of the indictment and was sentenced by the court to serve one year on each count, sentences to run consecutively.

Petitioner thereupon appealed to the United States Circuit Court of Appeals for the Fifth Circuit, which court affirmed the judgment of conviction as to counts Nos. 1, 2, 4 and 6 and reversed judgment as to counts 3 and 5. Immediately thereafter, petitioner sought a rehearing before the Fifth Circuit Court of Appeals, which rehearing was denied.

Reasons for Granting Writ

Both the District Court and the appellate court have so far departed from the accepted and usual course of judicial procedure as to call for an exercise of this Court's power of supervision. The action of the District Court in permitting the United States Attorney to comment on petitioner's failure to take the stand and the action of the Circui Court of Appeals for the Fifth Circuit, in itself giving, among its reasons for judgment, the failure of petitioner to explain or deny is a flagrant violation of the accepted and usual course of judicial procedure and is diametrically opposed to the decisions of other Circuit Courts of Appeal.

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BRIEF IN SUPPORT OF THE PETITION

Facts

Petitioner jointly indicted with another in the United States District Court for the Southern District of Florida, but was tried alone. At the conclusion of the presentation of the evidence by the Government, the Government rested. A recess was held and, thereafter, the Government moved to reopen the case and introduced further evidence, over the objection of counsel for petitioner. The objection was overruled and, thereupon, the defense rested on petitioner's plea of not guilty, entered at the outset of the trial.

Following this, the United States Attorney made the following argument:

> "Now this letter is in Count 1. That is the one that is alleged, and you have to believe beyond a reasonable

doubt; first, that there was a scheme devised by this defendant, either by himself or in connection with Boyer, and that they caused—either put or caused to be placed in the mail for transmission that letter. There is no question but that that letter went through the mail from Miami to A. C. Smith of San Antonio, Texas, and that he received it and produced it here. *There is no dispute about that and no denial.*" (R. 225)

After some other argument to the court by counsel for petitioner and for the Government (R. 226, 227, 228), we find the court's opinion on pages 229 and 230, as follows:

"The Court: Let me finish this first. The part of the argument that is excepted to which has to do with the District Attorney's remarks to the jury that there was no dispute about a certain letter and no denial—The Court observed the District Attorney at the time this part of the argument was made and recalls that it was made after both counsel for the defense had argued the case, and I did not observe any gesture of any kind that would indicate to the Court or anyone else that the District Attorney was referring to the defendant when he made this remark here that there was no dispute and no denial. My interpretation of the remark was that he had reference to the argument of counsel. His argument was in rebuttal of counsel for defendants; and he was dwelling upon that when he said there was no dispute about that and no denial. Therefore the Court did not interpret it to mean that the defendant hadn't testified or that the defendant himself hadn't denied it. I don't think that any juror could have so interpreted it. I don't see any other logical or reasonable interpretation of that remark except that, in answer to counsel's argument, he stated that there was no dispute and no denial as to this particular letter. The Court is of the opinion and finds that there has been no violation of the rules or the law with reference to directing the attention of the Jury to the fact that the defendant has not taken the witness sand. There-

fore the Court denies that motion of the defendant to declare a mistrial. And now we will take up the other matter of the bond.

Mr. Graham: May it please the Court, I would just like to make one more remark there. That it's inconceivable that the District Attorney could have been referring to anybody except the defendant when he said it hadn't been denied.

The Court: That's your interpretation which you have a right to have, Mr. Graham. I disagree with you on that, I shall let the remark stand."

Subsequent to all of this, the case went to the jury and a verdict of guilty on all six counts was duly returned by the jury. After the verdict, the petitioner was sentenced by the court to serve one year on each of the six counts, said sentences to run consecutively. Thereupon, the petitioner prosecuted an appeal to the Fifth Circuit Court of Appeals and that court affirmed in part and reversed in part and, in the judgment of the appellate court (R. 273), the appellate court said:

"• • • He offered no testimony whatever in explanation or denial."

And then (R. 276)

"• • • the facts stated are indeed even now undisputed and undenied by anyone • • •."

Argument

This Honorable Court held, in *Wilson* v. *United States*, 16 S. Ct. 765, 37 L. Ed. 650, that the act of March 16, 1878 (20 Stat. 30 c. 37) restrains both the Court and counsel from commenting upon the failure of an accused to testify. This doctrine was followed in the case of *De Mayo* v. *United States* (2 cases), 32 F. (2d) 472, wherein the court held that, for a District Attorney in argument to call attention,

though inadvertently, to the failure of the defendant to take the stand, is reversible error unless the Court sharply, emphatically, promptly and in unmistakable and positive terms advises the jury that the matter is improper and they should give no consideration thereto.

In the case at bar, both the Government and the defense availed themselves of their right to make opening statements. The defense counsel reiterated defendant's plea of not guilty and made a complete and emphatic denial of each and every allegation in the indictment in the following language:

> "That he had no scheme of any kind to defraud—took no part or participated in any way in defrauding anyone; and did not at any time ever—never has and especially in connection with these transactions— enter any mail or parcel advertisement or other article in the mail for the purpose of furthering any scheme to defraud anyone."

Surely there could have been no more positive and emphatic denial in behalf of this petitioner as to his having participated in any of the violations as set forth in the indictment. The petitioner had pleaded not guilty which, in itself, denies all of the allegations of the indictment and requires the Government to prove his guilt beyond a reasonable doubt. The United States could not have been referring to the argument of defense counsel when he stated

> "There is no question but that the letter went through the mail from Miami to A. C. Smith, San Antonio, Texas, and that he received it and produced it here. There is no dispute about that and no denial."

No one except the defendant in the lower court and the petitioner in this Court could have denied that he mailed that letter to Mr. Smith in San Antonio, Texas.

The Court below does not recall seeing the United States

Attorney turn and point to the petitioner at the time he made this statement but the Court below did not follow the jurisprudence set forth in the *De Mayo* case and did not sharply, emphatically, promptly and in unmistakable and positive terms advise the jury that this actoin was improper and that they should give no consideration thereto.

When the case reached the Fifth Circuit Court of Appeals, that court affirmed the lower court and upheld the District Judge in his opinion as to what the United States attorney referred to when he stated that there is no denial. But the most conclusive and powerfully persuasive argument of all that the United States Attorney was referring to the failure of the petitioner to take the stand is the fact that twice in the appellate court's own reasons for judgment they held, first

> "• • • he offered no testimony whatever in explanation or denial" (R. 273).

and

> "• • • the facts stated are indeed even now undisputed and undenied by anyone • • •" (R. 276).

For these reasons, it is respectfully submitted that the petition for Writ of Certiorari should be granted.

ALEX W. SWORDS,
Counsel for Petitioner.

ROBERT S. LINK, JR.,
Of Counsel.